United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

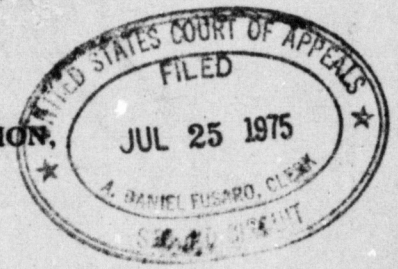
75-7046

7/18

B P/S

United States Court of Appeals

For the Second Circuit.



SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

-against-

CANADIAN JAVELIN, LTD., JOHN D. DOYLE, AND WILLIAM W. WISMER,

Defendants-Appellees,

SAMUEL H. SLOAN .

Intervenor-Appellant.

Appellant's Brief

SAMUEL H. SLOAN
Intervenor-Appellant pro se
917 Old Trents Ferry Road
Lynchburg, Va. 24503
(804) 384-1207

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel. (212) 447-5358

1

with his own civil action (see Sloan v Canadian Javelin Ltd.

INDEX

AUTHORITIES CITED

CASES: Page No.

CASES: Page No.

Irwin Colomb, counsel for CJV. Sloan displayed characteristic

CASES: Page No.

CASES: Page No.

CONSTITUTION, STATUTES, AND RULES:

CONSTITUTION, STATUTES, AND RULES: Page No.

OTHER AUTHORITIES:

plaint; namely, the appointment of a special receiver.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

75-7046

-against-

CANADIAN JAVELIN, LTD., JOHN D. DOYLE,
AND WILLIAM W. WISMER,

Defendants-Appellees,

SAMUEL H. SLOAN,

Intervenor-Appellant

APPELLANTS' BRIEF

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the court below err in denying intervention to the intervenor-appellant Samuel H. Sloan ("Sloan") either as of right or by permission ?

2. Did the court below err in denying the motion by the intervenor-appellant to vacate the permanent injunctions entered in this action ?

3. Did the Court below err in denying the motion by the intervenor-appellant for discovery of transcripts of depositions taken during the course of discovery proceedings in this action and in failing to require that these depositions be filed with the court pursuant to Rule 30(f) F.R. Civ. P. ?

4. Did the Court below abuse its discretion in refusing to order that the S.E.C. permit trading in Canadian Javelin, Ltd. to resume?

STATEMENT OF THE CASE

The Securities and Exchange Commission ("S.E.C.") commenced this action by filing a complaint on November 29, 1973 (*A3). The complaint alleged that defendants Canadian Javelin, Ltd. ("CJV"), John C. Doyle ("Doyle") and William M. Wismer ("Wismer") have engaged, are now engaged, and are about to engage in acts and practices which constitute and will constitute violations of Sections 5 and 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. 77e and 77q(a), Sections 10(b) and 13(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78j(b) and 78m(a), and Rules 10b-5, 12b-20, 13a-1 and 13a-13, 17 CFR 240.10b-5, 17 CFR 240.12b-20, 17 CFR 240.13a-1 and 17 CFR 240.13a-13, promulgated thereunder, (A3). The ad damnum requested injunctive relief (A19) and the appointment of a special receiver "to take all necessary action to protect the interests of CJV, its shareholders and creditors with respect to the transactions set forth in the complaint or arising therefrom" (A22). The ad damnum also requested mandatory orders (A23).

---

*In this brief, all references to the pages of the appendix will be designated by the letter A followed by the page number.

the district court should have permitted "discovery

The bulk of the complaint consists of a narrative account concerning various misdeeds of Doyle, who, according to the complaint, is the founder, director, chairman of the Executive Committee, principle stockholder, and chief executive officer of CJV and dominates its policies. According to the complaint, with Doyle at the helm, CJV has issued a series of false and misleading press releases which are described in considerable detail in Count I of the complaint (A9-A15). The complaint concludes that "the statements made in this continuous chain of hyperbolic press releases reveal the existance of a course of business that would, did and will operate as a fraud and deceit upon prospective purchasers and sellers of CJV securities." (A13). Specifically, according to the complaint, these press releases create the impression that (a) CJV has an immediate right to exploit its alleged copper discovery in Panama whereas no such rights presently exist and, at best, must wait for and be based upon a mining code which has not yet been promulgated (b) CJV has definitive commercial feasibility studies concerning the mining of the project whereas no final commercial feasibility study exists (c) CJV is finalizing and completing financial arrangements to begin immediate mining and production of the copper whereas no firm financial arrangements exists and (d) CJV has finalized and completed arrangements to sell the entire output of the project whereas no agreement exists to sell any eventual product and only preliminary negotiations have begun (A14). In language which is characteristic of the complaint, the S.E.C. alleges that the proposed Panama

copper mining project has been described as one of the world's largest and most profitable "all in superlative language more fit for suitable use by midway carnival hawkers than responsible officials of publically held companies" (A15).

The complaint commences with an account of the history of CJV and Doyle. The complaint alleges that on Septmeber 25, 1958 the United States District Court for the Southern District of New York issued a final judgment permanently enjoining CJV and certain of its officers including Doyle and others from violating the registration provisions of the Securities Act and the anti-fraud provisions of the Securities Act and the Exchange Act. The complaint states that the action stemmed from the S.E.C.'s charges that sales of unregistered CJV shares were being made in the United States through telephone calls from "boiler rooms" in Montreal. The complaint further states that the company consented to the injunction, without admitting the charges, and agreed to obey United States securities laws and to list itself on the American Stock Exchange (A5). With respect to Doyle, the complaint alleges (A5):

> "On February 5, 1965 Doyle pleaded guilty in the United States District Court for Connecticut to violations of the registration provisions of the Securities Act in connection with those sales of CJV stock. He was sentenced to serve three years in prison, 33 months of which were suspended. He

relating to the property or transaction which is the subject

> refused to surrender himself to United States officials and jumped bail. Presently he is a fugitive from justice. Doyle presently maintains residences in Panama City, Panama, and Montreal, Canada."[1]

The complaint then goes on to state that on Christmas Day, 1968 the Newfoundland government announced that it had approved an expanded CJV project to product linerboard in Stephenville, Newfoundland. The complaint alleges that from this point until early January, 1972 many false and misleading statements were made concerning that project (A8). These statements are specifically described in paragraphs 17-19 of the complaint.

However, the principle thrust of the complaint deals with a series of press releases concerning the Panama copper mining project; the first of these being a press release of June 22, 1973 which followed a trading halt of CJV on the American Stock Exchange which occured on June 20, 1973 (A10). This press release was followed by additional press releases dated July 5, 1973 and July 17, 1973. According to the complaint, this hyperbolic chain of press releases which contained numerous false and misleading statements occured at the time of substantial rise in price of CJV shares. The complaint alleges that on Friday, July 6, 1973 the shares of CJV closed at 7-1/4, that

---

1.....This allegation relates to United States v Doyle 348 F. 2d. 715 (2d Cir. 1965) cert. denied 382 U.S. 843 in which Doyle pleaded guilty to sending in 1957, 50 unrequested shares of CJV through the mail, was sentenced, and subsequently jumped bail.

during the week ending July 13, 1973 trading in the shares was very active and closed at 9-7/8 and that during the following two weeks active trading pushed the price up an additional 3-1/2 points closing on Friday, July 27, 1973 at 13-3/8 (A7).

With respect to the need for a special receiver, the complaint alleges that defendant CJV is now directed, managed and controlled by defendants Doyle and Wismer (A18) who, in view of CJV's history of issuing materially inaccurate and misleading press releases, have displayed "an abysmal pattern of total disregard for the defendants obligations under the securities laws" (A19). The complaint states that:

> "46 - Unless an independent person is authorized by court order to see that the defendant CJV's reporting obligations are met and has control over the dissemination of information to the investing public, the defendants will continue their violative conduct and CJV's shareholders and others will be continually (1) deprived of material information concerning CJV's financial status and business operations; (2) forced to rely on the defendants' false and misleading statements concerning CJV's activities; and (3) will be denied the material information necessary to make any informed investment decision.
>
> 47 - Additionally, due to the extensive foreign operations of the defendant CJV, a special receiver is needed to inquire into these operations wherever located and the financial status of CJV in order to report his findings to the Court and the Commission and to cause CJV to file with the Commission all amendments necessary to make CJV's filings comply with the federal securities statutes.
>
> 48 - Furthermore, to protect investors a special receiver is also needed to inquire into and account for all prior sales of securities by CJV and to report to this Court and the Commission all material undisclosed facts concerning the issuance of those securities and whether or not the issuance of said securities was exempt from the registration provisions of the Securities Act."

Whether or not the S.E.C.

On the same day that the complaint was filed, the S.E.C. suspended trading in all shares of CJV both over-the-counter and on the American Stock Exchange. At the time of the suspension of trading, CJV was listed on the American, Montreal and Vancouver Stock Exchanges (A4). In addition, on November 29, 1973, the S.E.C. issued a press release, Exchange Act Release No. 10534, which stated that "trading in the securities of Javelin was suspended in order to allow dissemination of the allegations in the S.E.C.'s complaint."

Following the initial suspension, the S.E.C. continued to order successive ten day suspensions of trading. In the action now on appeal, all the defendants appeared and answered (A24, A36). The action was placed on the trial calendar and in June and July, 1974 notices appeared daily in the New York Law Journal which stated that it was ready for trial. However, on July 17, 1974, on or about the eve of the scheduled trial date, all parties consented to what amounted to the settlement of the suit in that it was agreed that the district court retain jurisdiction for all purposes and that defendants CJV and Doyle consent to the entry of a judgment of permanent injunction (A52, A59) and that defendant Wismer would enter into a stipulation subject to the contempt powers of the court (A47).

The intervenor-appellant, who had not previously appeared in this action, but who had moved to consolidate this action

with his own civil action (see Sloan v Canadian Javelin Ltd. et al CCH Fed. Sec. Law Rep. ¶94579 (1973-4 transfer binder)), moved to vacate the permanent injunction and for an order granting discovery and requiring the S.E.C. to permit trading in CJV to resume. The intervenor-appellant also requested that the court direct that this action proceed to trial and that Sloan be permitted to appear and participate in the trial on his own behalf.

In support of his motion, Sloan stated that he had been a short seller of a total of 33,400 shares of CJV during July, 1973 and that the price of these shares went from 7-1/4 on July 5, 1973 to 14-5/8 on July 26, 1973 (A73). The moving affidavit further stated that as a result of this rise in price, Sloan had suffered a severe financial loss (A73).

Included as Exhibits to the moving affidavit was a letter from Wismer to Sloan dated August 3, 1973 (A81), three letters from Sloan to the S.E.C. (A82, A84, A86), one letter from Sloan to the American Stock Exchange (A83), a proposed amended complaint which Sloan had sought to file in Sloan v CJV et al, 73 Civil 3801, and 73 Civil 4403 (A90), press releases of CJV dated July 12, 1974 and July 17, 1974 (A107, A109), a letter from Sloan to Judge Mac Mahon (A112) dated June 24, 1974 which urged that the case before him be transferred to Judge Bonsal, and a letter from Sloan to Judge Bonsal dated December 7, 1973 which urged that the two cases be assigned to the same judge (A113).

Sloan's moving affidavit urged that he had a direct stake in the outcome of the S.E.C.'s suit against CJV since he had suffered severe financial loss as a direct result of the false and misleading press releases which were the subject of the S.E.C.'s complaint and that these same press releases were the subject of his own suit against CJV. In support of this contention, Sloan observed that Judge Bonsal had stated, in Sloan v CJV supra that Sloan was free to file a new complaint naming as defendants CJV, Doyle and Wismer but if he were to do so that action would be stayed pending the outcome of the S.E.C.'s injunctive suit. Sloan also asserted that the S.E.C. was created by Congress for the purpose of protecting the public and that Sloan was a member of that public and therefore entitled to the equal protection of the laws (A74). Sloan further stated that the S.E.C. had permitted CJV to terminate its suit by entering into a meaningless consent decree and that CJV had displayed contempt for the order of injunction on the very date that it was signed by issuing a false and misleading press release. That press release, which was included in Exhibit D (A109), stated that the suit between the S.E.C. and CJV had been settled and, after stating the terms of the settlement, went on to assert that CJV had outlined "one of the world's largest known copper deposits" in Panama (A110). The press release then reiterated substantially the same claims that the

In an analogeous situation in antitrust law,

S.E.C. had alleged to be false and misleading in its complaint. (Compare A110 and A111 with A10 - A15).

The moving affidavit also stated that CJV had led a charmed life, always managing to escape from having to defend in a trial or a hearing concerning the financial affairs of that corporation and the charges of fraud, bribery and misappropriation of assets which had been made over the preceeding twenty years. Sloan stated that the instant case represented the twenty-first time known to him where CJV had been the subject of a lawsuit and where, nevertheless, it had managed to avoid a trial or an evidentiary hearing. Sloan stated that in view of these facts, the order of injunction should be vacated.

The S.E.C. opposed this motion on the following grounds: (1) Sloan has no standing to intervene in this action, (2) Sloan is not entitled to intervene as a matter of right, (3) Sloan's interest in this action is not sufficient to allow intervention as of right, (4) the commission's settlement has not impaired or impeded Sloan's ability to seek relief and (5) the court should not grant Sloan's request for discovery. On page 7 of its 18 page memorandum, the S.E.C. stated the following:

> "It is well recognized that a large number of Commission cases are settled by consent decrees. This practice allows the Commission to bring far more enforcement actions than it could otherwise do. The allowance of intervention as of right would not only increase the number of enforcement actions resulting in trials and greatly increase the complexity and change the nature of these trials, but

would cut down the number of actions the Commission staff would bring.

> Enforcement actions for injunctive relief undertaken by government agencies in the public interest often involve considerations different from those involved in private actions to enforce private rights or to seek monetary damages. For example, in S.E.C. v Capital Gains Research Bureau, Inc., 375 U.S. 180, 193 (1963), the Supreme Court held that the "mild prophylactic" of injunctive relief when sought by the Commission under the federal securities laws is not to be circumscribed by rigid standards applicable to injunctions privately sought under common law."

Furthermore, the S.E.C. argued, if Sloan were permitted to intervene the result could be a divided trial or it could result in separate trials, in which case the jury trial must be had first. The S.E.C. also argued that in a private suit brought pursuant to the anti-fraud provisions of federal securities laws, a private party must show causation and standing which are "not involved in an enforcement action brought by the Commission" and that defendants in the private suit may be able to raise defenses which are unavailable in an enforcement action brought by the S.E.C. In addition, the S.E.C. argued that the Commission may introduce evidence in and enforcement action which might be inadmissible in a private suit before a jury and the quantum of proof necessary for the S.E.C. to prevail might be less in a particular case than that required to impose damage liability in a private action.

Sloan's motion was also opposed by counsel for CJV and counsel for Doyle and Wismer. According to the affidavit of

Irving Golomb, counsel for CJV, Sloan displayed characteristic arrogance in stating that he did not see any benefit to the public arising from the settlement of this suit (A116). Golomb also stated:

> "The plain purpose of the Sloan motion is shown in his paragraph 14, in which he requests the Court to direct the Securities & Exchange Commission to permit trading in Canadian Javelin Ltd. to resume immediately. Being a short seller, whose only interest is in the disaster which he hopes will ensue with respect to stocks he may sell, in order that he may buy them back cheaply and cover his position, what Sloan is actually doing is requesting this Court to put him back in business."

The affidavit of Golomb concluded that Sloan's motion should be denied because he admittedly had animosity towards the S.E.C. (A117).

The afficavit in opposition of counsel for Doyle and Wismer essentially reiterated some of the arguments made by the S.E.C. and by CJV (A118).

After nearly three months of deliberation, the district court denied Sloan's motion in an eight page decision reported in CCH Fed. Sec. Law Rep. ¶ 94,861 (1974 transfer binder). It is from this decision that this appeal is now taken.

SUMMARY OF ARGUMENT

The district court erred in denying intervention to the intervenor-appellant. Sloan has satisfied every criteria necessary to establish an unconditional right to intervene. It is undisputed that Sloan has an interest in the subject of this action. Furthermore, since Sloan takes the position that the consent injunction obtained by the S.E.C. is inadequate to protect his interest there can be no question that the interest which Sloan seeks to represent is not adequately represented by existing parties.

The only serious question is whether the disposition of this action may as a practical matter impede the protection of Sloan's interest. However, as a shareholder and as a short seller of CJV there can be no doubt that the disposition of this action will affect Sloan's interests. The district court appears to have overlooked the fact that Sloan's interest in the context of this action is more hostile towards the S.E.C. than it is towards CJV. The entry of a meaningless order of injunction, which will nevertheless have an adverse effect on the free trading of CJV's shares in securities markets, will decrease the likelyhood that Sloan will ever be able to recover execution on any judgment he might obtain in his lawsuit against CJV, Doyle and Wismer.

actions brought by the S.E.C. are unwilling to contest the

The judgments entered in this action should be vacated and this fact alone demonstrates the wisdom of permitting Sloan to intervene. Injunctions by consent of the type normally obtained by the S.E.C. are barred by Article III, Section 2 of the United States Constitution which requires that in order for the United States Courts to invoke their judicial power there must be an actual controversy. There is no actual controversy here as is demonstrated by the fact that all parties have consented to the injunction. Under these circumstances, a stipulation among all parties would have been more appropriate.

Furthermore, the district court is prohibited by Rule 52 F.R.Civ. P./ from entering an injunction absent findings of fact and conclusions of law. Without specific facts, the court cannot draft an order of injunction which complies with Rule 65(d). Rule 52 cannot be waived by the parties in any case and particularly not in a case where the public interest is involved. The order of injunction in its present form is not legally binding on CJV which is a publically owned corporation and is obliged only to adhere to the wishes of its stockholders provided that no laws are violated.

The injunctions are both inadequate and inappropriate. On the one hand, they constitute an unwarranted meddling into the financial affairs of CJV. On the other hand, they fail to provide for the principal form of relief sought in the com-

(See Weiss v Doyle 178 [illegible] op. 566 (1959) and Finley v Doyle

plaint; namely, the appointment of a special receiver. Furthermore, the S.E.C. has already obtained an injunction against CJV and Doyle which is still in effect. That earlier injunction is more comprehensive than the injunction entered in the instant case. For example, in the injunction entered on September 25, 1958, Doyle was barred from making any purchases and sales of CJV shares. The new injunction merely requires Doyle to report all transactions by him in CJV shares to the S.E.C. on a periodic basis (A56).

It is inappropriate for the S.E.C. to obtain a new injunction while alleging that the terms of the old injunction have been violated. The proper remedy would be for the S.E.C. to move for contempt. It is also inappropriate for the S.E.C. to request that the courts enjoin a person who, according to allegations made by the S.E.C., is a fugative from justice and who resides in Panama and Canada in order to absent himself from the jurisdiction of the U.S. courts.

If the allegations of the complaint are true, then the S.E.C. cannot seriously believe that a person such as Doyle would abide by the terms of the injunction. Conversely, if the allegations of the complaint are untrue then the injunction should not have been entered in the first instance. In either case, the injunction is superfluous and should be vacated.

These facts demonstrate that the principal and only purpose for which the S.E.C. has brought this action is to gain favorable newspaper publicity at the expense of the stockholders of CJV. The entry of an injunction under the circumstances of this case, which is typical of injunctive actions brought by the S.E.C., insures to the S.E.C. the publication of at lease two newspaper articles; one when the complaint is filed and the other when the injunction by consent is obtained. The S.E.C. publishes the "S.E.C. News Digest" principally for the purpose of summarizing its activities including the bringing of these injunctive proceedings so that they can be publicized in the news media. This practice is a violation of the canons of ethics and should be brought to an end by the courts.

The district court should have ordered that trading in CJV shares be permitted to resume. The S.E.C. was apparantly satisfied with the injunction it had obtained and no purpose could have been served in permitting the suspension of trading to continue. Furthermore, the trading suspension was illegal since sections 15(c) 5 and 19(a) 4 of the Exchange Act prohibit a trading suspension from extending beyond ten days. There is no question that the district courts have the power to enjoin illegal conduct including illegal conduct on the part of the S.E.C.

The district court should have permitted "discovery" of depositions taken in this action. The proper way to do this would have been to order the parties to comply with Rule 30(f) F.R. Civ. P. It appears to be the policy of the S.E.C. never to comply with this rule. The willful refusal on the part of the S.E.C. to comply with various rules of the F.R. Civ. P. should be brought to an end by the courts.

If the intervenor-appellant prevails on this appeal, this court should award costs against the S.E.C. as well as against CJV, Doyle and Wismer. All parties are entitled to the equal protection of the laws and the S.E.C. should be required to pay its fair share of the costs particularly since it provided the principal opposition to the motion in the district court.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN DENYING INTERVENTION TO THE INTERVENOR-APPELLANT.

Paragraph 7 of the moving affidavit of Sloan asserts (A74): "I have standing to intervene in this action." It is submitted that this is the case. Sloan is a stockholder of 13 shares of CJV. During July, 1973 he was a short seller of a total of 33,400 shares of CJV. He has pending before this

likes to bring can be found in S.E.C. v Goldman, Sachs & Co.

court an action to recover damages arising from injury sustained when the price of CJV shares rose because of false and misleading statements made in press releases which are the subject matter of the complaint filed by the S.E.C. in this action. Sloan also has an action pending before this court under U.S.C.A. docket number 75-7283 which seeks among other things to enjoin the S.E.C. from initiating and prosecuting any actions for injunctive relief. Furthermore, Sloan is seeking, in Sloan v S.E.C., U.S.C.A. docket no. 74-2457, an order declaring the power of the S.E.C. to suspend trading in securities in general and in CJV in particular to be unconstitutional. In addition, as a professional trader in securities, Sloan has a general interest in seeing to it that action by the government does not interfere with the ability of free trading markets to function properly. It is submitted that all of these circumstances confer upon Sloan the power to intervene in this action either by right or by permission.

Rule 24(a)(2) F.R. Civ. P. requires the showing of three elements in order to enable intervention as a matter of right. These are:

1. The applicant must claim an interest relating to the property or transaction which is the subject of the action.

2. The applicant must be so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interest.

3. The interest of the applicant must not be adequately represented by existing parties.

There appears to be no question that Sloan has an interest

relating to the property or transaction which is the subject of this action. On this point, the district court stated (A123):

> "Sloan, as a short seller of Canadian Javelin stock, undoubtedly has an interest in the transactions upon which this action is based."

In papers filed in the district court, neither the S.E.C. nor any of the defendants appeared to express disagreement on this point.

Furthermore, there can be no question that Sloan's interest is not adequately represented by existing parties. Two parties who have appeared in this action could possibly make a claim of representing the interests of Sloan. The S.E.C. could claim to represent the public and since Sloan is a member of the public, the S.E.C. could argue that therefore it represents Sloan. On the other hand, counsel for CJV represents CJV and presumably its stockholders. Since Sloan is a stockholder of CJV, counsel for CJV could claim that it adequately represents Sloan's stockholder interests.

The fact is, however, that neither the S.E.C. nor counsel for CJV has made any pretense of representing Sloan's interests. The S.E.C. has either stated or implied in numerous opinion letters that broker-dealers are not members of the public. It appears that if this is true, the mandate of the S.E.C. "to protect the public" does not require the S.E.C. to invoke its powers to protect Sloan, who was a registered broker-dealer at

the time of the events described in the complaint.

It is submitted that this argument is fallaceous and that Sloan is as much entitled to protection by the S.E.C. as anybody else. The right to the equal protection of the laws is a constitutional concept implied by the Fifth Amendment to the Constitution of the United States. Jackson v Statler Foundation 496 F. 2d. 623 (2d Cir. 1974).

In spite of this, there has never been an instance in which the S.E.C. has come into court for the stated purpose of protecting brokers and dealers. The S.E.C. seems to view its role as that of protecting the public from brokers and dealers rather than the other way around. It seems that Congress has accepted the notion that brokers and dealers need not be protected when it passed the Securities Investor Protection Act of 1970. It has been held that the objective of the Securities Investor Protection Act of 1970 was to protect members of the investing public, not brokers, and that broker-dealers can claim protection of the Act only to the extent that they were acting on behalf of their own customers in dealing with defunct brokerage firms. S.E.C. v Packer, Wilbur & Co. 498 F. 2d 978 (2d. Cir. 1974).[3]

3...It is the position of the intervenor-appellant that the Securities Investor Protection Act of 1970 is unconstitutional for this reason. However, that question is not presently before this court.

Whether or not the S.E.C. is correct in ignoring the pleas of registered brokers and dealers for the same protection that is accorded to the public, the fact remains that the S.E.C. has never expressed an interest in protecting the interests of a person in the position of Sloan. There is considerable doubt as to whether the S.E.C. is sincerely interested in protecting any entity other than the S.E.C. itself. On page 9 of its brief in the district court, the S.E.C. asserted that "prompt prosecution of the Commissions action and prompt disposition of the Commissions request for relief is essential." Essential to what, one might ask. It seems to be the position of the S.E.C. that it is the sole arbitor of what course of conduct is in the best interests of the public. It is submitted that this is not the case particularly where, as here, the injunctive relief obtained by the S.E.C. is both inadequate and inappropriate and must be vacated by this court.

In paragraph 12 of his affidavit in support of the motion to intervene Sloan stated: "The public has been damaged by the action of the Securities & Exchange Commission without any offsetting benefit." This statement puts this case in a different posture than S.E.C. v Everest Management Corp. 475 F. 2d 1236 (2d Cir. 1972) upon which the court below placed almost total reliance. Like the proposed intervenor in Everest, Sloan is seeking a money judgment against the defendants and hopes, by intervention and by obtaining a consolidation of his own action with that brought by the S.E.C., to be spared some of the financial burden he would be required to bear in pro-

secuting his own action. Also like the proposed intervenor in Everest, Sloan seeks, through intervention, to be able to make use at trial of evidence which the S.E.C. has developed in the course of its own investigation of CJV. The current policy of the S.E.C. combined with S.E.C. Rule 122, 17CFR 230.122, and S.E.C. Rule 0-4 17CFR 240.0-4 bar Sloan from obtaining access to this evidence through the use of subpoena power or other means.* However, unlike the proposed interview in Everest, Sloan shares an interest common to all stockholders of CJV in defeating certain aspects of the litigaion instituted by the S.E.C. The moving affidavit states that the parties to this motion are involved in a triangular struggle (¶9, A75). The moving affidavit then goes on to cite instances of wrongful conduct on the part of the S.E.C. It is apparent from this that Sloan's interests, in many respects, lie with the stockholders of CJV particularly in view of his request that the district court order that trading in the shares of CJV be permitted to resume. In his affidavit in opposition, counsel for CJV states that Sloan's only interests is the disaster which he hopes to bring upon the stockholders of CJV. It should be apparent that this statement by counsel for CJV was untrue. Although it is true that Sloan was a short seller of 33,400 shares of CJV in July, 1973, it is obvious that Sloan no longer maintained that short position at the time he moved to intervene.

The fact is that aside from his desire to obtain a money judgment against CJV, Sloan's interests are identical with those of the stockholders of CJV. In fact on May 27, 1975, the New York State Supreme Court, Appellate Division, First Department ruled that Sloan is presently a stockholder of 1,000

---

* Based upon the Freedom of Information Act, 5.U.S.C.552 et seq, Sloan currently has a request pending with the S.E.C. for access to all files and records in the possession of the S.E.C. regarding its investigation of CJV. The S.E.C. has yet to make an initial determination of whether it will provide to Sloan a copy of the requested documents.

CJV shares. That determination arose from a lawsuit entitled Edwards & Hanly v Sloan, N. Y. Supreme 15876/1973, which is based upon circumstances described in paragraphs 37 and 38 of the proposed amendment complaint (A103 - A104). In that case, the Appellate Division reversed the decision of the trial judge which held that a sale had taken place on August 15, 1973 and that title to 1,000 shares of CJV had passed from Sloan to Edwards & Hanly on that date, and that Sloan was entitled to a judgment in the amount of $13,000 representing the market value of the 1,000 shares of CJV on August 15, 1973. An appeal of the decision of the Appellate Division has been taken to the Court of Appeals of the State of New York.

With respect to Sloan's interest as a stockholder, there can be no question of his right to intervene in this action, provided that his interests are not adequately represented by counsel for CJV. In an action by the S.E.C. to liquidate and terminate a utility corporation, a preferred stockholder was allowed to intervene for herself and her class, since the management were nominees of the common stockholders and had no equity in the assets of the corporation and the preferred stockholders should be represented and protected. In re Securities & Exchange Comm. (1943 DC Del.) 48 F. Supp. 716. Furthermore, in the context of a proceeding brought by the S.E.C., an intervenor need not have a direct personal or pecuniary interest in the subject of the litigation. S.E.C. v United States Realty & Improv. Co. 310 U.S. 434 (1940).

In an analogeous situation in antitrust law, intervention would be permissable. Intervention by an individual stockholder of two merged banks and by a competing bank was allowed in an antitrust divesture proceeding wherein the United States and the merged banks had filed a stipulation consenting to the entry of a final judgment, on the grounds that the intended intervenors had sufficient interest in opposing the proposed final judgment and consolidation of the merged banks. United States v First Nat. Bank & Trust Co. 280 F. Supp. 260 (D C Ky. 1967) aff'd. 391 U.S. 469 rehearing denied 393 U.S. 901.

The mere fact that a final decree has been entered does not necessarily bar intervention on the ground of tardiness. Defense Plant Corp. v United States Barge Lines, Inc. 145 F. 2d 766 (2d. Cir. 1944). If circumstances warrant, intervention after final judgment may be permitted within the discretion of the court. Hurd v Illinois Bell Tel. Co. 234 F. 2d 942 (7th Cir. 1956) cert. denied 352 U.S. 918 rehearing denied 352 U.S. 977; Diaz v Southern Drilling Corp. 427 F. 2d 1118 (5th Cir. 1970) cert. denied 400 U.S. 878 rehearing denied 400 U.S. 1025. The circumstances may be such as to render intervention after judgment as a matter of right. Kozak v Wells 278 F. 2d 104 (8th Cir. 1960). Intervention may be allowed even after final decree where it is necessary to preserve some right which cannot otherwise be protected. Hodgson v United Mine Workers 153 App. D C 407, 473 F. 2d 118 (1972); United States v Wilhelm Reich Foundation 17 FRD 96 (D C Me 1954) aff'd. 221 F. 2d 957 (1st Cir.) cert. denied 350 U.S. 842; Hobson

power of the United States and determining the rights of many

v Hansen 44 F.R.D. 18, 5 ALR Fed. 497 (DC Dist. Col. 1968). Furthermore, the decrees entered in this action are not "final." It appears from the record that the S.E.C. did not consent in writing to the entry of the injunctions or otherwise give its written approval. In fact, the injunction as to CJV appears to contemplate further litigation by the S.E.C. (¶¶ 11, 16, A66-67). In a civil action brought by the United States, the District Court may not enter a "consent" judgment without the consent of the Government. United States v Ward Baking Co. 376 U.S. 327, 334 (1964). Therefore, Judge MacMahon erred in entering a judgment in this action absent the written consent of the S.E.C. to the entry of a "final" decree foreclosing further action by the S.E.C.

The opinion of the court below was that the real interest of Sloan, as a short seller of CJV shares, had little to do with that of the public (A125). It is submitted however, that even as a short seller of CJV, Sloan has the same interests as that of a stockholder particularly in the context of an action involving the anti-fraud provisions of the rules of the S.E.C. The only difference between a short seller and a purchaser of securities is that a short seller cannot exercize voting rights (or indeed negative voting rights) over the shares he has sold short. However, a short seller has an interest in all other matters including the dividends paid by the issuer of the shares he has sold short. In the case of a dividend, the short seller must pay, either to the purchaser of the shares he has sold short or to the person from whom the shares sold short have been borrowed, the equivalent amount of the dividend paid. Furthermore, there can be no doubt that a short seller is as much entitled to the protection of the federal securities laws as a purchaser of securities.

there is necessity for clear and explicit findings of fact

The principal argument advanced by the S.E.C., with which the district court agreed, was that the disposition of this action would not impair or impede Sloan's ability to protect his interest. However, the district court was in error in its determination of what Sloan's interest was. The district court apparently relied upon the statement by counsel for CJV which stated that Sloan was seeking to bring economic disaster to the stockholders of CJV (A117). In this regard, the district court stated that "Sloan desires a resumption of trading because he can cover his short position in Canadian Javelin stock and avoid a huge financial loss only if the company's shares are again traded on the open market, and at a depressed price." (A126).

The fact is, that for reasons set forth previously, this is not the case. As Sloan stated in his moving affidavit, his first objective was to vacate the consent injunction obtained by the parties. Sloan further stated that based upon his personal experience, the S.E.C. uses extortionist tactics in obtaining injunctions by consent and this would seem to account for its high rate of success. Sloan stated: "I do not believe that the United States District Courts should be used by a government agency as a means of legitimizing extortionist tactics."

There is an issue here which is of great importance particularly as a result of recent events. It seems that the

S.E.C. has adopted a new policy with respect to the injunctive actions which it almost routinely brings against public companies. In the past, the S.E.C. has usually requested and obtained by consent an injunction which merely cites by reference various provisions of statute or of S.E.C. rules. However, commencing with the instant case the S.E.C. now seems to seek in most cases an agreement that the public corporation in question will follow a course of conduct which, in the stated opinion of the S.E.C., will insure that securities law violations do not occur in the future. Thus far during 1975, the S.E.C. has commenced injunctive actions against Gulf Oil Corp., Northrop Corp., United Brands and several other of the largest American corporations. These injunctive actions, all of which were terminated on the same day that they were commenced, have generated a tremendous amount of publicity both domestically and in foreign countries. The reason for this is that the S.E.C., in its respective complaints, alleged that the corporations in question had paid bribes to officials of foreign countries while failing to disclose the payment of these bribes in 10-K reports and other reports filed with the S.E.C. The bring/ing of these injunctive actions has led to great consternation to the parties, the public stockholders, and the public in general and has therefore caused precisely what the district court sought to avoid in denying the motion to intervene (A125).

Experience has demonstrated that the officers of the public companies which are named as defendants in injunctive

findings of fact in conformity with Rule 52(a)

actions brought by the S.E.C. are unwilling to contest the allegations made by the S.E.C. in open court and, instead, are anxious to settle as quickly as possible. This is not a surprising result since the existing management of such corporations are almost invariably accused, either directly or by implication, of some form of wrongdoing. By contesting these injunctive actions and requiring the S.E.C. to prove its case in court, the management would be opening themselves to personal liability which could be avioded by the simple expedient of giving the S.E.C. everything it wants: to wit, an injunction by consent.

The question here is whether a stockholder or other interested party can intervene in such a lawsuit and successfully move to vacate the consent injunction on the ground that his interest is not adequately protected. It is submitted that in the context of these injunctive actions brought by the S.E.C., any stockholder should be permitted to do exactly this. It has long been recognized that in stockholder derivitive actions, counsel hired by existing management often cannot realistically be expected to adequately represent the interests of the stockholders. This question has arisen before in the context of the seventeen stockholder's derivitive actions brought against CJV in 1959 after the S.E.C. obtained its injunction by consent in 1958. The cases are cited on page 77 of the appendix. There Diamond & Golomb, who is counsel for CJV in the instant case, started a derivative action against Doyle after several other derivative actions had been commenced, and participated in successful motions to stay the federal court actions

In the case at the bar, the reference to sections of

(See Weiss v Doyle 178 F. Supp. 566 (1959) and Finley v Doyle 178 F. Supp. 863 (1959)) and in a successful motion to consolidate all of the state court actions Armstrong v Doyle 193 N.Y.S. 2d 421 (1959). However, in Armstrong v Doyle, Judge Henry Clay Greenberg denied the motion of Diamond & Golomb to be appointed lead counsel and appointed Pomerantz, Levy & Haudek instead citing a possible conflict of interest on the part of Diamond & Golomb since it represented plaintiffs who were named as defendants in some of the actions to be consolidated.

As will be demonstrated in the next section of this brief, the injunction obtained by the S.E.C. not only fails to protect the interests of the public but also constitutes an unwarranted and unconstitutional meddling in the internal managerial affairs of CJV. In the cases of Gulf Oil Corp., Northrop Corp. and United Brands, the injunctive actions brought by the S.E.C. had the result of bringing about the resignation of high officers in these corporations and led to a realignment of corporate management. In the instant case, it appears that Wismer resigned as president of CJV (A110) perhaps in return for an agreement by the S.E.C. not to pursue its demand for an injunction as to Wismer (A47).

It is submitted that the circumstances of this case, the increasing tendency for the S.E.C. to bring injunctive actions of this nature and the general unwillingness of counsel in cases such as this to contest the actions brought by the S.E.C., all militate to require the court to permit intervention as a matter of right in cases such as this.

If intervention as a matter of right is to be denied permissive intervention should be permitted. The district court agreed that "Sloan's claim has numerous questions in law and fact in common with the S.E.C. injunction action" (A124). However, the district court decided that "intervention would unduly delay and prejudice adjudication of the rights of the original parties" (A127). It is submitted that this determination is erroneous. Sloan takes the position that the S.E.C. has no rights what-so-ever and is not even possessed of the required "standing to sue." See Flast v Cohen 302 U.S. 633 (1973). However, again, the wisdom of permitting permissive intervention is demonstrated by the fact that the injunction agreed to by the then existing parties must be vacated. The district court stated that (A125):

> "The S.E.C. and the defendants have, through careful negotiation, worked out a settlement designed to ensure the defendants' compliance with the securities laws and to protect the public from further violation of those laws."

If the district court were correct in its determination that the interests of the public were adequately protected by the injunction in the instant case, it would perhaps be correct for the district court to deny permissive intervention. However, it is emphatically re-emphasized that the district court is in error on this critical point.

It should be noted that the district court denied Sloan's request for leave to appeal. At one time it was the rule that

jumped bail, who is considered to be a fugitive from justice,

an order denying permissive intervention was not appealable. Brotherhood of R.Trainman v Baltimore & O.R. Co. 331 U.S. 519 (1947). Therefore, the only way to appeal would have been from an interlocutory decree pursuant to 28 U.S.C. 1292(b). However, that rule has been supplanted, Ionian Shipping Co. v British Laws Ins. Co. 426 F. 2d 186 (2d Cir. 1970) and there is no proceedural bar to the bringing of this appeal irrespective of the contrary determination of the district court.

POINT I

THE DISTRICT COURT ERRED IN FAILING TO VACATE THE INJUNCTIONS OBTAINED BY CONSENT.

A

AN INJUNCTION BY CONSENT IS BARRED BY ARTICLE III SECTION 2 OF THE UNITED STATES CONSTITUTION BECAUSE THERE IS NO ACTUAL CASE OR CONTROVERSY BEFORE THE COURT.

To anyone who reads the "S.E.C. News Digest" or the financial sections of the major newspapers it must seem that hardly a day goes by in which the S.E.C. does not obtain an injunction by consent. The S.E.C. commences injunctive actions in the Southern District of New York nearly every day and these cases constitute a high percentage of the cases filed in that court. All but a tiny percentage are "settled" by the entry of a consent decree and it is obvious that in most cases the terms of the consent decree have been worked out in advance between the parties.

A typical example of the type of case that the S.E.C.

would be enforceable through contempt proceedings, which I

likes to bring can be found in S.E.C. v Goldman, Sachs & Co., SDNY, 74 Civil 1916, in which a complaint was filed in the Southern District of New York on May 2, 1974, and the injunction by consent was signed by Judge Tyler and entered on the same day. The complaint in full text is reported at CCH Fed. Sec. Law Rep. ¶94,528 (1973-74 transfer binder) and the injunction by consent is reported at CCH Fed. Sec. Law Rep. ¶94,556 (1973-74 transfer binder). The complaint alleged that Goldman, Sachs & Co. "has engaged, is engaged and is about to engage in acts and practices which constitute violations of Section 17(a) of the Securities Act of 1933." The complaint further alleged that "during the relevant periods herein [Goldman, Sachs & Co.] offered and sold securities of Penn Central Transportation Co., namely commercial paper." The first and only cause of action was in essense that "from in or about August, 1968 through in or about May, 1970" Goldman, Sachs & Co. sold said commercial paper in violation of section 17(a) of the Securities Act of 1933.

As everybody knows, Penn Central Transportation Co. declared bankruptcy in or about May, 1970. Clearly, Goldman,Sachs & Co. was not offering for sale in the capacity of an underwriter any commercial paper in Penn Central Transportation Co. on May 2, 1974, nor was it likely to do so in the foreseeable future. Therefore, the statement made by the S.E.C. in its complaint that Goldman, Sachs,& Co. " was engaged and is about to engage" in the sale of commercial paper of Penn Central Transportation Co. on May 2, 1974 was a lie. However, the S.E.C. does not seem to find it disturbing that its own staff attorneys would tell an obvious lie in the course of filing a complaint. The fact is that the

consequences. It proves incontestably, that the judiciary

S.E.C. staff tells lies every day. It is apparent from its actions that the S.E.C. is fond of reading headlines about itself which contain statements such as:

S.E.C. IN COMPLAINT STATES THAT ROBERT VESCO SPIRITED AWAY $224 MILLION

In that case, the allegation made by the S.E.C. that Robert Vesco "spririted away" $224,000,000 has never been and probably never will be proven. However, a tremendous amount of publicity has been generated by the S.E.C. regarding this affair and whether or not the allegations made by the S.E.C. concerning Robert Vesco are true, they are an accomplished fact in the minds of the public.

In S.E.C. v Goldman, Sachs & Co. Judge Tyler signed a consent decree which enjoined Goldman, Sachs & Co. from effecting the sale, in violation of Section 17(a) of the Securities Act of 1933, of commercial paper issued by Penn Central Company, Penn Central Transportation Co. or Pennsylvania Company. Undoubtedly, Judge Tyler spent at least five or ten minutes in consideration of the matter before signing the consent injunction. One can only wonder whether Judge Tyler gave any thought to the fact that Goldman, Sachs & Co. could not possibly violate the consent decree even if it wanted to do so. Since Penn Central Company and all of the other companies in question were in bankruptcy, it is unlikely that anyone would buy commercial paper in these companies even if Goldman, Sachs & Co. were to undertake to sell such commercial paper.

The point is that in this and most cases, the consent injunctions obtained by the S.E.C. accomplish nothing more than the bringing about of embarrassment and unfavorable publicity

to the parties enjoined with an equivalent amount of favorable publicity to the S.E.C. On May 6, 1975, in a speech to the Society of Business Writers, Ray Garrett Jr., Chairman of the S.E.C., defended this proceedure on the part of the S.E.C. as follows:

"I am referring particularly to the unfavorable comment that I have read rather often about our enforcement procedures. For some time, I have read that the lawsuits we bring against persons who have violated our laws, being frequently settled at the time they are filed, or shortly thereafter, result only in a slap on the wrist and an admonition to sin no more. This most recently has been raised with regard to our actions against certain large corporations for having substantial sums, in unaccounted-for funds, used, among other things, for illegal political contributions. Why do we let the management of such companies off with a promise not to do it again?

The first answer to the question is that we do not. In the cases that have generated this adverse comment, we, in fact, have obtained the creation of special committees of uninvolved persons to make a thorough investigation of all of the transactions involved -- a far more detailed investigation than we have been able to make with our own staff -- and sometimes the retention of special counsel to investigate and prosecute any claims that might justly be brought against management or others on behalf of shareholders. We have, on occasion, however, successfully negotiated for the reimbursement to the company of substantial sums by officers responsible for misappropriations, and in every case we have insisted upon the establishment of procedures to reduce the likelihood of a recurrence.

The decision to employ some of these remedies is based upon the Commission's need to conserve its limited resources and to require that the persons responsible for the alleged misconduct bear the direct cost of completing this painstaking work. This is not to say that the Commission retains no further presence in the case. Indeed, the staff closely monitors the examination and, if it should believe that the examination has not been carried out according to the spirit of the court decree, the Commission is prepared to reassert itself in the litigation.

All this does not satisfy those who think someone also ought to go to jail. We, however, think these are substantial remedial measures that provide good assurance to investors against the continuation or repetition of the improper behavior. The criticism seems to be that they do not inflict sufficient pain. Perhaps they do not, I am not the best judge of that.

I do observe, however, that the pain may be greater than it appears as one reads of our complaint and the quick settlement. To a confirmed crook, it may be one thing. To one who has

been operating among, and wishes to be regarded as, one of the leaders in American industry, it is quite another. While I am not an expert at measuring pain, I am quite certain that our actions -- the very fact of them -- against major corporations and their top management, inflict excruciating pain. We have, in fact, contributed to the destruction or impairment of more than one reputation and career, even though that has not been our desire.

It is also true that our enforcement actions customarily spawn one or more class actions on behalf of shareholders or others who seek big money damages, compensatory and punitive. We do not stimulate these, but they are the natural consequence of our making public our view that some illegal behavior has taken place. In many instances, these produce the penalty that hurts the most.

The important thing for our critics to understand in these matters is that our authority for going to court is to prevent illegal behavior or its recurrence, not to punish past behavior. We can go to court on the civil side, on the ground that the defendant is about to do something wrong and must be stopped -- a reasonabley rare occurrence -- or that he has erred in the past and therefore might do it again -- our most common posture. On the whole, the courts have been liberal in accepting our argument that a past trangression is enough to justify enjoining future transagressions, but occasionally we lose on the ground that there is no serious likelihood of recurrence.

Given the fact that our basis for being in court at all is to achieve protection against recurrence, it seems reasonable to accept settlements that offer everything, or almost everything, that we could obtain through extended and expensive litigation. All we can get from complete success in our court cases is an injunction against further violations and what lawyers call "ancillary relief" -- the appointment of special counsel, audit committees, a receiver, some disgorgement of ill-gotten profits and the like. If we can get the injunction and a reasonable deal on the ancillary matters, then it seems the wise thing to do. There is no assurance that we could do better at the end of a long trial, costing everybody, including the Government, a lot of money.

If one wants to inflict more pain, that must be done through criminal prosecutions, which are the province of the Department of Justice and the U.S. Attorneys. I do not want to disassociate ourselves from this process."

It is apparant from this remarkable statement by the Chairman of the S.E.C. that the principal goal of the S.E.C. is to inflict as much pain as possible and the principal means by which this pain is inflicted is through the use of the injunction "by consent." It is submitted that injunctions "by consent" are constitutionally impermissable particularly

where the public interest is involved. Any other result would be conducive to corruption in government. In this case, it is the position of the interventor-appellant that the S.E.C. is thoroughly corrupt.

In any event, there is no such thing as an injunction "by consent" in actions brought by the S.E.C. Every injunction action commenced by the S.E.C. contains a thinly veiled threat of criminal prosecution if the target of the injunction action does not submissively consent to the entry of the injunction because actions brought by the S.E.C. invariably allege violations of the acts are necessarily violations of criminal law.

In United States v Parrott 248 F. Supp. 196 (1965), it was held that a defendant to an injunction action brought by the S.E.C. cannot subsequently be subject to criminal prosecution for acts which form the basis of the S.E.C.'s complaint. However, this rule does not appear to have been adopted by the higher courts. Nevertheless, the rational for the decision in United States v Parrott has a bearing on the issues involved in this case, If the S.E.C. brings an injunction action against a corporation and its officers, and, in its complaint, alleges violations of criminal law, the corporate officers cannot be expected to defend in such an action because, by their defense, they would be requiring the S.E.C. to prove facts which would inevidably lead to their own criminal prosecution provided, of course, that the rule in United States v Parrott is not universally adopted. However, if the holding in United States v Parrott is correct then the bringing of all injunction actions is constitutionally impermissible since by the very act of instituting

the injunction action, the S.E.C. and the United States of America is estopped from instituting a criminal prosecution. This, in effect, gives the S.E.C. the authority to pardon violations of criminal law. However, under Article II Section 2 paragraph 1 of the United States Constitution, only the President of the United States has the power to grant pardons for offenses against the United States. It is true that every time the United States attorney permits the statute of limitations to run on a case in which he has evidence that a crime has been committed, he, in effect, grants a pardon to the person or persons who might otherwise be the subject of a criminal prosecution. However, the discretionary authority of the United States attorney is derived from that of the President of the United States. Unlike the United States Attorneys, the commissioners of the S.E.C. cannot be fired by the president nor are they answerable to him. It is submitted that for this reason, the S.E.C. cannot be entrusted with the sole authority to decide who to prosecute and who not to prosecute. Outside parties should be permitted to intervene, and, in cases such as this, an injunction obtained by consent should be vacated.

From this argument, one arrives at the more fundamental point that the United States courts do not have the authority to issue injunctions by consent because there is no actual case or controversy involved. Numerous decisions by the United States Supreme Court require strict adherence to this provision of the constitution. It has been established that a controversy must be one that is appropriate for judicial determination, must be definite and concrete touching the legal relations

of parties having adverse legal interests, and it must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character. Aetna Life Insurance Co. v Haworth 300 U.S. 227 (1937). In order to satisfy the requisite of a case or controversy under Article III of the Constitution, the question must be presented in the context of specific live grievance. Goosby v Osser 409 U.S. 512 (1973) See also Moore v Charlotte-Mecklenburg Board of Education 402 U.S. 47 (1971); DeFunis v Odegaard 416 U.S. 312 (1974); Alabama ex. rel. Baxley v Woody 473 F. 2d 10 (5th Cir. 1973). A controversy must be between a plaintiff and a defendant who asserts an interest adverse to his. In the absence of such a situation, there is no justiciable controversy and the case must be characterized as being academic rather than justiciable. Johnson v Interstate Transit Lines 163 F. 2d 125 (10th Cir. 1947).

In the general case of injunction actions brought by the S.E.C., the parties have agreed in advance to a "settlement" of the suit by the entry of an injunction "by consent" even before the complaint has been filed. It is submitted that in all such instances, no case or controversy exists and the district court judge should not even perform the ministerial act of endorsing the injunction. Whenever a district court judge signs an order, he is invoking the judicial power of the United States. This is ordinarily not permitted when there is adequate protection at law. Wilson v Shaw 204 U.S. 24. In this case, the parties are willing to stipulate and if the defendant enters a stipulation and agrees not to violate the law in the future, the district court should conclude that an injunction is not necessary. Cf. Mitchell v Lublin, McGaughy & Associates 358 U.S. 207, 215 (1959). In the case at the bar, Judge MacMahon clearly erred by endorsing the injunctions (A56, A67) because he was invoking the judicial

power of the United States and determining the rights of many individuals who were not parties to this action, namely the public stockholders of CJV, even though no case or controversy had been presented to the court. Under these circumstances, the injunction must be vacated.

It is noteworthy that when Sloan moved to intervene, all existing parties objected and argued that the injunctions should not be disturbed. In effect, two supposedly adverse parties were arguing the same side of the case. In Moore v Charlotte-Mecklenburg Board of Education, supra, the court of appeals ordered a dismissal when both sides argued on the same side of the controversy. It is submitted that that principle should be applied here and that the injunctions should be vacated and the action remanded for further proceedings in the district court.

B

THE INJUNCTION MUST BE VACATED BECAUSE THE DISTRICT COURT FAILED TO COMPLY WITH RULE 52(a) F.R. CIV. P.

It is of the highest importance to proper review of actions of the Federal district court in granting or refusing an injunction that there should be fair compliance with the requirement of Rule 52(a) F.R. Civ. P. with regard to a separate statement of findings of fact and conclusions of law. Mayo v Lakeland Highlands Canning Co. 309 U.S. 310 (1940); Brown v Quinlan Inc. 138 F. 2d. 223 (7th Cir., 1943). In an action for an injunction to restrain violations of certain sections of a regulation promulgated by an administrative agency,

signed an injunction which enjoined ten of the forty-

there is necessity for clear and explicit findings of fact as to what the violations were, if any. Bowles v Russell Packing Co. 140 F. 2d. 354 (7th Cir. 1944). Where the district court enjoined defendants without any comment as to the reason or the legal basis for ruling,an injunction should be vacated because of district courts failure to comply with Rule 52(a) United States v Rohm & Haas Co. 500 F. 2d 167 (5th Cir. 1974). Where allegations of the complaint bring it within the general rule that equity will not enjoin enforcement of criminal statute and case is an appropriate one for the issuance of a temporary injunction trial court should make findings in compliance with Rule 52(a). Pacific American Fisheries Inc. v Mullaney 191 F. 2d 137 (9th Cir. 1951). An interlocutory or other injunction should not be filed unless findings of fact and conclusions of law are filed with the decree. United States v Ingersoll-Rand Co. 320 F. 2d 509 (3rd Cir. 1963).

An agreement between the parties that the district court need not enter findings of fact is not effective as requirement of Rule 52(a) is mandatory. Berguido v Eastern Air Lines Inc. 369 F. 2d 874 (3rd Cir. 1966) rehearing denied 378 F. 2d 369 cert. denied 390 U.S. 996 rehearing denied 391 U.S. 909 rehearing denied 392 U.S. 917. It is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all, including the public, whose intersts may be affected by the injunction. Inland Steel Co. v United States 306 U.S. 153 (1939).

In the case at the bar all defendants who were enjoined

agreed to waive the entry of findings of fact and conclusions of law under Rule 52(a) F.R. Civ. P. (A58, A69). Perhaps if there were no public interest involved that would be permissible. However, in this case, the principle argument advanced by the S.E.C. is that there is great public interest involved in this litigation. However, this great public interest itself requires the entry of findings of fact and conclusions of law in conformity with Rule 52(a) F,R. Civ. P. Absent findings of fact, there is no way that the appellate courts or the district court can determine that the injunction serves any remedial purpose to prevent the re-occurrance of past violations of securities laws. Without specific facts, the court cannot draft an injunction order to comply with Rule 65(d) F.R. Civ. P. Hodge v Field 320 F. Supp. 775 (1968) aff'd 435 F. 2d 1309 (9th Cir. 1968). See also United States v Ward Baking Co., supra 376 U.S. at 331; Associated Press v United States 326 U.S. 1, 22 (1946). For this reason, the injunctions entered in the instant case must be vacated.

C

THE INJUNCTION FAILS TO SATISFY THE REQUIREMENTS OF RULE 65(d) F.R. CIV. P.

Rule 65(d) relating to the necessity of setting forth reasons for the issuance of injunctive or restraining order, specificity of terms, and description of acts sought to be restrained, is mandatory. Shannon v Retail Clerks, International Protective Assn 128 F. 2d 533 (7th Cir. 1942); Mayflower Industries v Thor Corp 182 F. 2d 800 (3rd Cir. 1950); Brumby Metals Inc. v Bargen 275 F. 2d 46 (7th Cir. 1960). The injunctions entered in this action are deficient in two respects. First, they do not state reasons for the issuance of the injunction. This failure necessarily follows from the failure of the district.

court to make findings of fact in conformity with Rule 52(a) F.R. Civ. P. Second, they incorporate by reference other documents; namely, S.E.C. Rules 10b-5, 12b-20, 13a-1 and 13a-13, 17 CFR 240.10b-5, 17CFR 240.12b-20, 17CFR 240.13a-1 and 17CFR 240.13a-13 as well as sections 5 and 17(a) of the Securities Act, 15 U.S.C. 77e and 15 U.S.C. 77g(a) and Sections 10(b) and 13(a) of the Exchange Act, 15 U.S.C. 78j(b) and 15 U.S.C. 78m(a). (A52, A54, A55, A59, A61, A62, A63). The purpose of Rule 65(d) is to enable a person reading the order of injunction to know what act or acts were to be restrained without being referred to the complaint or other document for that information. Seagram-Distillers Corp. v New Cut Rate Liquors, Inc. 221 F. 2d 815 (7th Cir. 1955) cert. denied 350 U.S. 828. It ~~is par~~ticularly inappropriate for an injunction to incorporate by reference various S.E.C. rules since these rules are in a constant state of flux and only a specialist could be expected to keep abreast of the changes therein. Furthermore, because the rules are constantly changing, a course of conduct which presently violates a rule would perhaps not constitute a violation in the future and a course of conduct which is not now in violation of a rule might, in the future, become a rule violation. It is submitted that a district court cannot enjoin a course of conduct when it does not know what that course of conduct is. Furthermore, the Code of Federal Regulations, which is the only authoratative source for the S.E.C. rules, is never current and a wait of several months may be required before it can be obtained from the superintendent of documents.

was in wilful or reckless disregard for the truth."

In the case at the bar, the reference to sections of the Securities Act and the Exchange Act and to various rules promulgated thereunder destroys any value the injunction might otherwise have. The complaint in this action alleges various facts and further alleges that these facts demonstrate violations of statute and rules. The answers of CJV, Doyle and Wismer admit, in some cases, that certain alleged facts are true but deny that the statute and rules have been violated. The injunction does nothing to resolve this controversy. Paragraph I of the injunction as to CJV orders that "defendant Javelin..... [is] permanently enjoined....from directly or indirectly.... (A) obtaining money.....(B) employing any device....and (C) engaging in any act.....in connection with the offer, purchase or sale of securities of Javelin its subsidiaries or affiliates in violation of Section 17(a) of the Securities Act of 1933 15 U.S.C. 77g(a) and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) and Rule 10b-5, 17CFR 240.10b-5 promulgated thereunder." (A61-2). However, CJV contends that its prior acts do not constitute violations of the appropriate statute and rules. Therefore, from the point of view of CJV, it is free to conduct itself precisely as it has done in the past. This attitude is exemplified by the issuance of a press release on the very day the injunction was signed (A109-111) which makes the same statements that the S.E.C. has contended were false and misleading in the past. Significantly, the S.E.C. did not move for contempt and it is unlikely that such a motion would have been successful considering the language of the injunction.

Paragraph II and III of the injunction as to CJV (A62-63) suffers from the same infirmity as does paragraphs I, II and III of the injunction as to Doyle (A53, A54, A55). From this it is apparent that the injunction is a sham and must be vacated. Furthermore, any injunction which merely recites the law is a legal nullity and should be vacated.

D

IN VIEW OF THE ALLEGATIONS OF THE COMPLAINT, INJUNCTIVE RELIEF IS INAPPROPRIATE AS TO DEFENDANT DOYLE AND THEREFORE SHOULD BE VACATED.

The complaint describes defendant Doyle as a "fugitive from justice" (A5, ¶7). According to CJV's most recent proxy statement, Doyle jumped bail and is considered to have illegally absented himself from the jurisdiction of the United States courts. Various newspaper articles as well as CJV's own proxy statement, have reported that immediately after the complaint in this action was filed, Doyle returned from Panama to Canada after a long absence and, on December 7, 1973, was promptly arrested by the Royal Canadian Mounted Police. According to the affidavit of W. Michael Drake (A45, ¶3) Doyle, when deposed, asserted his constitutional right to each and every question asked by the S.E.C. staff.

From all this, one must conclude that Doyle is a "confirmed crook" and, according to the statements made by S.E.C. Chairman Garrett (**post** P. 34 last line), injunctive relief as to Doyle is inappropriate. It is true that Doyle must be deemed innocent until proven guilty, but if Doyle is innocent, there is no reason to burden him and the courts with an injunction.

In any event, it is farscial to enjoin a person who has

jumped bail, who is considered to be a fugitive from justice, who is wanted by the F.B.I., who refuses to return to the United States for any reason, and who cannot be extradited from Canada because violations of the Securities Act are not violations of Canadian law and therefore Doyle is considered to have committed a non-extraditable offense. The effect of an injunction is to subject a person to the possible contempt power of the courts and since Doyle obviously cannot be subjected to this power the injunction as to him has no effect. Furthermore, under United States v Parrott, supra Doyle, at some future date, may claim immunity from criminal prosecution and this result should not be permitted.

Doyle need not be enjoined for an independant reason which is the injunction as to CJV also applies to Doyle as long as he remains an employee of or in active concert with CJV. In S.E.C. v Coffey 493 F. 2d 1304 (6th Cir., 1974) cert. denied ____U.S.____, 42 L. Ed. 2d 837, 95 S.CT. 826 (1975) the court stated:

"We are disturbed by the S.E.C.'s tacit suggestion that a Court may personlly enjoin a corporate official whenever his company or one of its agents has committed a securities law violation. An injunction is effectively drawn when it enjoins violators and their "agents, servants, employees and those persons in active concert or participation with them who receive actual notice of [an] Order." This is precisely the clause used by the District Court to enjoin all of Appellants' cohorts, in issuing its permanent injunction against Appellants. Furthermore, it is a basic equity principle that "whenever an injunction, whatever its nature may be, is directed to a corporation, it also runs against the corporation's officers," in their corporate capacities. 10 W. Fletcher, Private Corporations §4875 (1970 ed.). To name individuals personally and to find that they committed a violation they did not commit would be an intolerable abuse of the judicial process. In practical consequence, it would damage the reputations of persons without reason to believe that they personally had violated the securities laws. Cf. S.E.C. v Frank, 388 F. 2d 486, 489 (2d Cir. 1968). Such an arbitrary procedure would also deny named defendants basic constitutional rights in subsequent proceedings, since a personal injunction

would be enforceable through contempt proceedings, even if a future violation were alleged that was based on activity wholly apart from the individuals' corporate relationship."

Since the injunction is superfluous as to Doyle it should be vacated.

E

THE ORDER OF INJUNCTION CONSTITUTES AN UNWARRANTED AND UNCONSTITUTIONAL MEDDLING INTO THE INTERNAL FINANCIAL AFFAIRS OF CJV, IS INJURIOUS TO ITS STOCKHOLDERS, AND FAILS TO PROVIDE FOR ANY CONCOMITANT BENEFITS.

Judges are not free to read their private motions of public policy into the Constitution. Olsen v Nebraska 313 U.S. 236, 246-247 (1941). Yet, in signing the order of injunction, the district court stated its judicial opinion as to what course of conduct was in the best interests of the public. It is submitted that under the concept of federalism,which is embodied in the Constitution of the United States, the judicial branch of government has only the authority to decide that one side wins and the other side loses. As Hmilton wrote in The Federalist No. 78:

"Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispensed the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficasy of its judgments.

This simple view of the matter suggests several important

consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power ; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive."

From this it is clear that it was the intention of the framers of the Constitution that the judicial department would be the weakest of the three branches of government. However, because of this weakness, the judicial department is permitted its greatest strength which is that it is the final authority as to what the law is. United States v Nixon ____U.S.____ 41 L. Ed. 2d 1039, 94 S.CT 3090. (1974). For this reason, beyond deciding questions of fact and law, the power of the judiciary cannot extend. Otherwise the judiciary would be able quickly to usurp all of the powers of the legislative and executive departments and a contrary result would probably have been reached in Holtzman v Schlesinger 484 F. 2d 1307 (2d Cir, 1973) and other cases.

In the case at the bar, the district court clearly exceeded its judicial authority. The district court stated in denying the motion of the intervenor-appellant:

"The S.E.C. and the defendants have, through careful negotiation, worked out a settlement designed to insure the defendants' compliance with the securities laws and to protect the public from further violation of those laws." (A125).

This statement is nothing more than the expression of an opinion by the district court as to matters of public policy. The intervenor-appellant is in clear disagreement as can be seen by his statement that:

"the settlement reached by the parties to this lawsuit.... does not advance the cause of the public in any way." (A75, ¶10).

Who is right and who is wrong in this difference of opinion should not be a matter for the appellate courts to decide since clearly the district court exceeded its authority in expressing any opinion on such a subjective matter.

In its memorandum in opposition to the motion by the intervenor-appellant,[4] the S.E.C. summarized the injunctions entered in this action as follows:

"In addition to broad injunctions against further violations of the securities laws .... the judgments entered by the court provide in essence:

(a) that the board of directors of Javelin shall consist of at least 40% outside independent directors who shall meet certain criteria satisfactory to the Commission;

(b) that Javelin shall establish a standing compliance committee, a majority of which shall consist of the independent outside directors to pass on all information disseminated to the public and designate a public information officer to be responsible for the dissemination of all information for Javelin;

(c) that Javelin shall name a special outside counsel satisfactory to the Commission to review the dissemination of all information to the public by Javelin or any of its subsidiaries, its officers and directors, and notify the Commission and Javelin's Board of Directors in any respect in which he believes the Judgment is not being carried out and advise the Board as to the steps necessary to cure such failure;

(d) that no officer or employee of Javelin shall disseminate information to the public except upon the express request and prior approval of the Compliance Committee and special counsel;

---

4. It seems that the S.E.C. failed to attach an affidavit of service to the memorandum it filed in the district court. For this reason, there is no reference on the docket sheet to this memorandum (A1) and it is not part of the record on appeal. However, the original memorandum of the S.E.C. as well as Sloan's memorandum can be found in the file which is retained in the district court.

(e) that Javelin shall designate and at all times maintain an agent in the U.S. authorized to accept service of civil or administrative process relating to the activities of Javelin, its subsidiaries and affiliates, served by or on behalf of the Commission including subpoenas and complaints;

(f) that Javelin file within 60 days, or at such a later time as the Commission may permit all necessary reports and all amendments and supplements to reports on file as may be required."

This statement is an acceptable summarization of terms of the actual injunction which applies to CJV particularly since the paragraph of the injunctions dealing with this matter (A63, A67) is lengthy and is not conducive towards additional summarization. However, it should be noted that in requiring that 40% of the outside independant directors shall meet certain criteria satisfactory to the S.E.C., the injunction specifies that such persons shall be (a) persons of integrity and (d) persons who are not presently officers of CJV. (A64). Aside from the fact that the S.E.C. is an unlikely choice for a body qualified to determine who can be considered to be a "person of integrity," it is submitted that neither the S.E.C. nor any other branch of the government, can constitutionally be permitted to decide who is to serve on the board of directors of a private corporation. Therefore, there can be no question that this aspect of the injunction constitutes an unwarranted and unconstitutional meddling in the internal financial affairs of CJV. Furthermore, the injunction causes injury to the stockholders of CJV in that, among other things, it deprives them of the freedom to elect their own board of directors. On this point, it should be noted that the complaint alleges

that Doyle owns only about 20% of the outstanding CJV shares[5] (A5, ¶7) and that at least 75% of the public float of CJV shares is owned by United States residents (A4, ¶6). From these figures it is apparent that Doyle and Wismer were able to manage CJV because the public stockholders permitted them to do so. It is inappropriate for the S.E.C. to question the wisdom of the stockholders of CJV. Undoubtedly, Doyle's position in the management of CJV derived from the fact that, based on the past history and present balance sheet of CJV, the shares of CJV would have little if any value if Doyle's presence at CJV came to an end. In fact, according to New York Times articles in 1965 and 1966, Doyle was forced to resign from his position as chief executive officer of CJV after he jumped bail and fled to Canada, but, when the price of CJV shares subsequently plummeted, Doyle was re-instated to his former position by the acclamation of the stockholders.

The deprivation of a fundamental right may, in some cases, be justified by a quid pro quo theory. See O'Connor v Donaldson, ____U.S.____, decided June 26, 1975. However, in the case at the bar there is no quid pro quo because the S.E.C., in depriving the stockholders of CJV of their fundamental rights, have not provided any concomitant benefit. The only theory under which the entry of the injunction in this case would appear to be justified is the theory that the injunction protects prospective purchases of CJV shares from potential injury.

---

5. From statements filed with the S.E.C., it appears that Doyle may not have voting rights even to those shares.

However, it is well established that speculative contingencies provide no basis for the courts to pass on substantive issues, DeFunis v Odegaard, 416 U.S. at 320 quoting from Hall v Beals 396 U.S. 45 (1969), in the absence of evidence that there is a prospect of "immediary and reality." Golden v Zwicker 394 U.S. 103, 109 (1969); Maryland Casualty Co. v Pacific Coal & Oil Co. 312 U.S. 270, 273 (1941). Furthermore, any application of a quid pro quo theory is inherently suspect where constitutional rights are involved.

In view of the notariety which CJV has achieved during the course of the past twenty-four years, there might be a temptation on the part of this court to decide that there is a prevailing interest in not disturbing the injunctions which have been entered in the district court. However, it should be pointed out that the instant case provides only one example of the increasing tendency of the S.E.C. to meddle into the internal affairs of public companies. Like CJV, Gulf Oil Corp. has been forced to reallign its management because of action brought by the S.E.C. In 1974 Gulf Oil Corp. had sales of $16,458,000,000 and net income of $1,065,000,000. Gulf Oil Corp. is currently ranked seventh in Fortune's directory of the 500 largest industrial corporations. CJV is less than a smidgen by comparison. However, whatever rule this court decides in the instant case, it will presumably also apply in the case the action brought by the S.E.C. against Gulf Oil Corp. Therefore, this court should exercize care in making its decision.

F

THE INJUNCTION IS NOT LEGALLY BINDING ON CJV

CJV is a dominion corporation and is controlled by Canadian corporation law. If the stockholders of CJV were to elect a slate of directors which did not meet with the approval of the S.E.C., a question would arise as to whether these directors could legally serve. Undoubtedly, this question would be within the jurisdiction of the Canadian courts and it would be resolved in favor of the stockholders, particularly since acts which constitute offenses under the Securities Act and the Exchange Act do not constitute offenses under Canadian law. Even if CJV were a domestic corporation there can be little doubt that if the board of directors of CJV,which did not meet with the approval of the S.E.C.,were elected, those directors would not likely be held in contempt of court because of the act of serving as directors, in spite of whatever dissapproval the S.E.C. might express. It should be noted that directors are "officers" of a corporation and therefore all directors of CJV are restrained and enjoined from the moment that they are elected (See A60).

In short, the district court does not have the power to enforce that aspect of the injunction which requires that a slate of directors of CJV be elected which meets certain criteria to the satisfaction of the S.E.C. (A63-A64) nor does the district court have the power to enforce other similar aspects of the injunction. The result is that the injunction is not legally binding on CJV. As a result,

the injunction must be vacated.

It is further submitted that it is inappropriate for the district court to enter a permanent injunction in this form. For example, twenty years from now CJV may be in an entirely different business with entirely different management and with nothing more than a historical connection to the present CJV, yet, nevertheless, CJV will still presumably be required to adhere to the terms of the injunction with respect to the election of directors, the appointment of outside counsel and so on. These would be no equity in this result and, for this reason, the injunction should be vacated.

G

THE INJUNCTION IS SUPERFLUOUS SINCE CJV HAS PREVIOUSLY BEEN ENJOINED ON THE COMPLAINT OF THE S.E.C.

Paragraph 5 of the complaint alleges (A4):

"On September 25, 1958, the United States District Court for the Southern District of New York issued a final judgment permanently enjoining CJV, certain of its officers including Doyle and others, from violating the registration provisions of the Securities Act and the anti-fraud provisions of the Securities Act and the Exchange Act."

The action in question is S.E.C. v Canadian Javelin Limited, and 39 others (including aliases), 1958 Civil Action File No. 138-85. This appears to have been an action in which CJV and Doyle agreed to an injunction before the complaint was filed. No summons was issued at the request of the S.E.C. and, two days after the complaint was filed, the Hon. Sidney Sugarman

signed an injunction which enjoined ten of the forty named defendants including CJV and Doyle. There were no further proceedings and, after the passage of several years, the action as to the other defendants was dismissed for failure to prosecute.

The prior injunction is substantially identical to paragraphs I, II and III of the injunctions entered in the instant action but there are significant differences. Among other things the original injunction enjoins CJV and Doyle from directly or indirectly

> "making use of any means or instruments of transportation or communication in commence or of the mails to sell common capital stock of Canadian Javelin Limited through the use or medium of any prospectus or otherwise....unless and until a registration statement is in effect with the S.E.C. as to such securities."

In the action at the bar, the complaint alleges (A16, ¶36) that there has never been a registration statement declared effective by the S.E.C. pursuant to the Securities Act. The answer of CJV admits this allegation (A31, ¶36) but denies that it was ever required to file such a registration statement. The injunction in the instant action as to Doyle requires that Doyle shall report to the S.E.C. all of his transactions in the securities of CJV on a periodic basis.

If Doyle were to report transactions as he has agreed to do by the terms of the injunction, he would be, in effect, admitting to violations of the prior injunction. In a contempt proceeding based upon violations of the injunction in the instant case, Doyle could undoubtedly raise a Fifth Amendment defense. From this it can be seen that the injunction in the instant case is superfluous in its present form and the district court has been required to waste considerable time in the preparation of a meaningless decree.

III

THE ARGUMENTS ADVANCED BY THE S.E.C. IN OPPOSING THE MOTION OF THE INTERVENOR-APPELLANT IN THE DISTRICT COURT ARE WITHOUT MERIT

In opposing the motion in the district court, the S.E.C. filed an 18 page memorandum which contained arguments which the S.E.C. appears to advance in all such cases. The principal thust of the arguments advanced by the S.E.C. was as follows:

> "Thus, the Congress has entrusted to the Commission the responsibility for taking decisive action in the public interest and if further injury from continuing violations of the securities laws is to be prevented, prompt prosecution of the Commission's action and prompt disposition of the Commission's request for relief is essential."

From this assertion, for which no authority was cited, the S.E.C. presented a variety of arguments the effect of which was that the courts should permit the S.E.C. to prevail under a lower standard of proof, that defenses which are available to defendants in private litigation are not available to defendants in actions brought by the S.E.C.,that defendants in S.E.C. enforcement proceedings are not entitled to a trial by jury, that unlike private litigants the S.E.C. need not demonstrate specific injury, and that if intervention is permitted, delay will inevidably be the result. It is submitted that each of these arguments are either without merit or are inappropriate to consider in connection with a motion to intervene.

If the arguments advanced by the S.E.C. were to be adopted by the courts, the result would be the establishment of two

standards of jurisprudance, one which would apply to the S.E.C. and another which would apply other litigants. This argument has been advanced by the S.E.C. on several reported occasions and has been in all cases rejected. In S.E.C. v Century Investment Transfer Co. (CCH Fed. Sec. Law. Rep. ¶93,232, 1971-72 transfer binder) Judge Motley stated:

"Despite S.E.C.'s argument to the contrary, the rule in this Circuit now appears to be that an application for a preliminary injunction in securities cases must meet the traditional equity requirements for preliminary injunctions in general. In S.E.C. v Frank, 388 F. 2d 483, (1968) the Second Circuit Court of Appeals concluded that §20(b) of the Securities Act, 15 U.S.C. 77t(b) and §21(e) of the Exchange Act, 15 U.S.C. 78u(e) do not modify the basic principles governing equitable relief. (Id. at 491). The Court ruled that the statute's language granting the S.E.C. an injunction upon a proper showing 'affords no sufficient basis for concluding that Congress meant special weight to be given the Commission's decision to allow its staff to institute suit.' Id. at 491."

More recently, in S.E.C. v Coffey, supra, the Sixth Circuit arrived at the same conclusion and specifically rejected the argument of the S.E.C. that it was entitled to special consideration and that it should be permitted to adhere to a different standard than that required of private litigants. In Coffey, the Sixth Circuit adopted the rule in this circuit established by Lanza v Drexel & Co. 479 F. 2d 1277, 1306 (2d Cir. 1973) (en banc) which held that in actions based upon violations of Rule 10b-5, there must be a showing that the defendants acted "in willful or reckless disregard for the truth." The Sixth Circuit held that this standard applied not only to private litigation but also to S.E.C. injunctive actions and stated:

"If the S.E.C. can prove that the alleged omissions represent facts which were known or should have been known by Coffey.....then Coffey may have violated Rule 10b-5(2). In addition to these factors, however, it is essential that the S.E.C. show that Coffey's inaction

was in 'wilful or reckless disregard for the truth.'"

It should be noted that in Coffey and in many other cases, including litigation involving the defendants, the S.E.C. has argued that under S.E.C. v Capital Gains Research Bureau, Inc. 375 U.S. 180 (1963), the S.E.C. is required to adhere to a lower standard of proof than that required of private litigants. However, S.E.C. v Capital Gains Research Bureau made no such holding. What the Supreme Court did say was:

"The content of common-law fraud has not remained static as the courts below seem to have assumed. It has varied, for example, with the nature of the relief sought, the relationship between the parties, and the merchandise in issue. It is not necessary in a suit for equitable for prophylactic relief to establish all the elements required in a suit for monetary damages." 375 U.S. at 193.

In footnote 39 of the decision, the Supreme Court explained the necessity for making this distinction by stating that the respondents had engaged in a course of conduct which satisfied the common law requirements for a showing that it had defrauded its customers and, in an action for equitable relief, it would not be necessary to establish that these customers had actually suffered injury as a consequence of these fraudulent activities, even though this would be a necessary requirement in a suit for monetary damages based upon the same fraudulent activities. Thus, the Supreme Court did not decide that in injunctive actions brought by the S.E.C., the court could accept a lower standard or a different quantum of proof than it would in an action involving private parties. Instead, the Supreme Court held that the showing would be different in certain respects. This limited holding is undoubtedly correct.

In an action for injunctive relief the plaintiff must demonstrate that the defendant, unless enjoined, is likely to engage in future wrongful conduct resulting in irreparable harm to the plaintiff. In order to satisfy the requirement that the harm be "irreparable", a showing must be made that the damage cannot be repaired by the money payment of any judgment if the injured party succeeds in litigation. See Brandwein v American Stock Exchange (CCH Fed. Sec. Law Rep. ¶93,767, 1972-73 transfer binder).

Although the S.E.C. appears to contend that in injunction actions the courts should require a lower quantum of proof than in actions for monetary damages, just the opposite rule in fact applies. In Gilligan v Morgan, 413 U.S. 1 (1973) the Supreme ruled that the complaint should be dismissed in an action for injunctive relief. There, the court stated that the request for an injunction was "a broad call on judicial power to assume continuing regulation over the activities of the Ohio National Guard." 413 U.S. at 5. A concurring opinion by Mr. Justice Blackmun cited Baker v Carr, 369 U.S. 186, 198, 226 which stated that the courts are not permitted "to enter upon policy determinations for which judicially manageable standards are lacking." 413 U.S. at 14. However, in Scheuer v Rhodes 416 U.S. 232 (1974), an action for monetary damages based upon the same factical circumstances as Gilligan v Morgan, the Supreme Court remanded the case for further proceedings either by way of summary judgment or by trial on the merits.

It appears that the S.E.C. believes that whenever it commences an injunction action, the district court judge to whom the case is assigned should be required to put that case at the top of

his trial calendar and should give it a preference over litigation involving private parties. The rational of this is that the S.E.C. should not get "bogged down" in litigation. On this same rational, the S.E.C. is generally able to obtain a directive from the district court preventing it from being required to make discovery. Generally, in actions brought by the S.E.C., if the district court accepts the arguments advanced by the S.E.C., litigants who are named as defendants in S.E.C. injunction actions quickly find themselves stripped of all defenses and proceedural safeguards to which they would otherwise be accorded. It is submitted that this practice should come to an end and that the S.E.C. should be treated no differently from any other party who seeks relief by filing a complaint in the United States District Court.

Many arguments advanced by the S.E.C. should not even be considered in connection with a motion to intervene. For example, the S.E.C. has argued that intervention could lead to divided trials. Although this may be true, that is purely a proceedure matter within the discretion of the district court judge. Just as the S.E.C. has the discretionary power to decide whom to name as a defendant whenever it files a complaint, the district court judges have the right to control their own docket. American L. Ins. Co. v Stewart 300 U.S. 203, 215. For this reason, the question of whether there would be a divided trial or a trial in which a jury would decide some factual issues whereas the judge would decide other factual issues is not a matter to be considered in connection with a motion to intervene because it is raised

prematurely. Furthermore, it would be detrimental to the judicial system and to the litigants for the court to require that testimony be duplicated unnecessarily as would occur if the two actions were not consolidated. Under the Federal Rules of Civil Proceedure, the same court may try both legal and equitable causes in the same action. Beacon Theatres v Westover 359 U.S. 500, 508 (1959). Thus, the arguments advanced by the S.E.C. have no merit.

Point IV

THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO ORDER THAT THE S.E.C. PERMIT TRADING IN CJV TO RESUME

On the day the S.E.C. filed its complaint in the action at the bar, it also suspended trading in CJV. In a press release issued at the time of this suspension of trading, Exchange Act Release No. 10534, the S.E.C. stated that:

"trading in the securities of Javelin was suspended in order to allow dissemination of the allegations in the Commission's complaint."

By this statement, the S.E.C. made it clear that the filing of the complaint and the suspension of trading were inextricably intertwined. It follows that when the lawsuit was terminated, the trading suspension should have been terminated at the same time. Instead, the S.E.C. continued the trading suspension until January 27, 1975, and subsequently, on April 30, 1975, reinstated it. As of the writing of this brief, the suspension of trading in CJV is still in effect.

It is submitted that the district court abused its discretion because (1) since the S.E.C. was satisfied with the adequacy

of the injunction it had obtained as to CJV, there was no reason for the suspension of trading to be continued and (2) the suspension of trading was illegal because under Sections 15(c)(5) and 19(a)4 of the Exchange Act the S.E.C. may suspend trading for a period not to exceed ten days.

It is submitted that the merit of these two arguments is unquestionable and the decision of the district court on this point should be reversed.

Point V

THE INJUNCTION OBTAINED BY THE S.E.C. IS INADEQUATE TO PROTECT THE INTERESTS OF SLOAN AND THE STOCKHOLDERS OF CJV IN THAT IT FAILS TO PROVIDE FOR THE APPOINTMENT OF A SPECIAL RECEIVER

Page 9 of the S.E.C.'s memorandum in opposition to Sloan's motion to intervene stated:

"Indeed, the Commission has obtained essentially all that it asked for and more in the public interest."

This statement is simply unture. The principal form of relief requested in the ad damnum of the complaint is the appointment of a special receiver. In fact, in view of the allegations made in the complaint this is the only form of relief which would be likely to remedy the abuses complained of.

It is well established in this circuit that the district court has the discretionary power to appoint a receiver upon appropriate showing of the S.E.C. and that on appeal the defendants will bear a heavy burden to overturn the district courts' exercize of its discretion. S.E.C. v Koenig, et al 469 F. 2d 198 (2d. Cir. 1972); S.E.C. v S & P National Corp.

360 F. 2d 741, 750-51 (2d Cir. 1966); S.E.C. v Manor Nursing Centers, Inc. 458 F. 2d 1082, 1105 (2d Cir. 1972); S.E.C. v Culpepper 270 F. 2d 241, 250 (2d Cir, 1959). It is submitted that in view of the circumstances of this case, the appointment of a receiver is the only form of relief which would be appropriate.

As noted previously, the instant case is not the first time that a lawsuit was filed naming CJV as a defendant. In litigation commenced in 1959, after all of the actions had been effectively consolidated into one action, Armstrong v Doyle, supra, a referee was appointed, Milton D. Goldman, who proceeded to spend nearly two years in an analysis of the various claims of waste and misappropriation of the assets of CJV. He was awarded $125,000 by the court for his efforts. The report of the referee can be found on file in the New York State Supreme Court at 60 Centre Street, New York, N.Y.

The report of the referee set forth and analyzed 26 causes of action and recommended a settlement. The proposed settlement was that Doyle would agree to pay over a period of time $3,350,000 which would include $350,000 in cash and $3,000,000 in common stock of CJV at the market value of these shares on the date of payment. In addition, it was proposed that the board of directors of CJV would be democratized, that controls would be tightened and that there would be a court appointed firm of auditors. All parties agreed to this proposed settlement and in 1963 it was approved by the court. The court also ordered that CJV pay $957,000 in legal fees to the various attorneys who participated in that litigation. (A77).

The settlement was a failure. According to CJV's own published balance sheet, CJV still owes $367,500 from this litigation (A77). Doyle never paid any of the $3,350,000 and, until recently, this amount was carried as an account receivable on CJV's balance sheet. The agreement to democratize the board of directors and to tighten controls apparently had no sustained effect. Doyle was permitted to remain in control of CJV and not only did he not make restitution as a result of this litigation but he remained in a position where he could further waste and misappropriate the assets of CJV.

It appears that in most cases Doyle did not misappropriate assets in the traditional sense of looting the company treasury. It is questionable as to whether CJV ever had a substantial treasury to loot. Most of Doyles'alleged misappropriations relate in some way to a manipulation of the market price of CJV and to the the fraudulent issuance of CJV shares. In many cases, shares of CJV stock were issued for assets of questional value and Doyle or his nominees were left free to sell these shares in the open market. The first cause of action in the report of the referee states that on July 16, 1951, Doyle first acquired control of CJV by delivering to CJV all of the stock of a corporation which he then owned, the assets of which were, in fact, grossly exaggerated and that, in return for this stock, Doyle received 650,000 shares of CJV which he was, of course, free to sell.

If the allegations made in this and the remaining 25 causes of action in the report of the referee are true, then it would appear that every major financial transaction involving

CJV from 1951 until the date of the report, June 21, 1961, was in some way fraudulent. Furthermore, from a press release issued by the S.E.C. on April 1, 1971 in connection with its suspension of trading in CJV from March 17, 1971 to April 5, 1971, CJV's entry into its Panamian copper drilling project followed the pattern of fraudulent financial transactions involving CJV over the previous twenty years. In the Panamanian case, after CJV had completed its preliminary exploration of the Cerro Colorado area, a Panamanian corporation, Pavonia, S.A.,was formed which then was awarded for no consideration the copper exploration concession from the government of Panama. However, the S.E.C. could not determine what person or person's were the real or beneficial owners of the stock of the newly formed Pavonia, S.A. Subsequently, all of the Pavonia stock was sold to CJV in return for newly issued shares CJV. It does not take much imagination to reach the conclusion that the newly issued shares of CJV ultimately wound up in the hands of Doyle and he then sold the shares.

It appears from documentary evidence available to this court that all of the assets of CJV are owned not directly but through subsidiaries. Indeed, it has often been stated that CJV has never mined an ounce of ore. According to charges made by the Royal Canadian Mounted Police, CJV acquired its principal asset, the Javelin-Wabush Iron Contract, from which it derives virtually all of its annual income of approximately $4.5 million, by paying bribes to Oliver L. Vardy, a former Newfoundland deputy minister of economic development, and to Joseph R. Smallwood who was, for nearly twenty years, the premier of Newfoundland. Thus, it appears that the principal successes of CJV in the

past has been derived from the payment of bribes to key government officials. This state of affairs led State Supreme Court Justice Greenberg once to characterize the activities of Doyle and CJV as that of "swashbuckling lawlessness."

It is submitted that in view of these circumstances it is both appropriate and necessary that a hearing be held to determine if a receiver should be appointed. In view of the fact that CJV has been specifically accused of paying bribes to government officials, it is not appropriate to permit the government officials employed by the S.E.C. to let CJV off the hook with a meaningless consent decree absent a hearing and appropriate findings of fact by the district court. For this reason, the injunction should be vacated, intervention should be permitted, and the action should be remanded to the district court for further proceedings.

Point VI

THE DISTRICT COURT ERRED IN FAILING TO REQUIRE THAT THE S.E.C. COMPLY WITH RULE 30(f) F.R. CIV. P. BY FILING IN COURT ALL DEPOSITIONS TAKEN DURING THE COURSE OF DISCOVERY PROCEEDINGS.

The docket sheet (A2) shows that notices were filed to take oral depositions of Doyle and Wismer as well as of S.E.C. staff attorney Larry B. Grimes. None of these depositions were ever filed in court.

The situation is clouded by the affidavit of W. Michael Drake (A45) which stated that the deposition of Wismer was never taken and that of Doyle was never transcribed. Nevertheless, it can be seen from examination of the docket sheets

in other litigation commenced by the S.E.C., that the S.E.C. never complies with Rule 30(b) F.R. Civ. P. and never files depositions in open court. Furthermore, the S.E.C. will not make these depositions available in response to the service of a subpoena. Appeal of the United States Securities & Exchange Commission 226 F. 2d 501 (6th Cir. 1955). The only way to remedy this situation would be to make a motion for "discovery" as Sloan has done and therefore the motion should have been granted to the extent of ordering the S.E.C. to comply with Rule 30(f) F.R. Civ. P. This, incidently, provides a further grounds for permitting Sloan to intervene because if Sloan were permitted to intervene he would be permitted to obtain these depositions as a matter of right.

CONCLUSION

For all of the reasons, set forth above, the decision of the district court should be reversed on all points and the action should be remanded for further proceedings.

Respectfully submitted,

Samuel H. Sloan

Samuel H. Sloan
Intervenor-Appellant pro se
917 Old Trents Ferry Road
Lynchburg, Va. 24503
(804) 384-1207

Dated: Lynchburg, Virginia
July 17, 1975

APPENDIX

UNITED STATES CONSTITUTION

Article III, Section 2, Paragraph 1:

The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizen of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign states, citizens, or subjects.

Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 24

INTERVENTION

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an inconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency upon timely application may be permitted to

intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Rule 30(f)1

Certification and Filing by Officer; Exhibits; Copies; Notice of Filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Rule 52(a)

Effect

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conslusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 65(d)

Form and Scope of Injunction or Restraining Order.

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Rule 122, 17 CFR 230.122
Nondisclosure of information obtained in the course of examinations and investigations.

Information or documents obtained by officers or employees of the Commission in the course of any examination or investigation pursuant to section 8(e) or 20(a) (48 Stat. 80, 86; 15 U.S.C. 77h(e) 77t(a)) shall, unless made a matter of public record, be deemed confidential. Officers and employees are hereby prohi bited from making such confidential information or documents or any other non-public records of the Commission available to anyone other than a member, officer, or employee of the Commission, unless the Commission authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest. Any officer or employee who is served with a subpena requiring the disclosure of such information or the production of such documents shall appear in court and, unless the authorization described in the preceding sentence shall have been given, shall respectfully decline to disclose the information or produce the documents called for, basing his refusal upon this section. Any officer or employee who is served with such a subpena shall promptly advise the Commission of the service of such subpena, the nature of the information or documents sought, and any circumstances which may bear upon the desirability of making available such information or documents.

Rule 0-4, 17 CFR 240.0-4
Nondisclosure of information obtained in examinations and investigations.

Information or documents obtained by officers or employees of the Commission in the course of any examination or investigation pursuant to section 17(a) (48 Stat. 897, se. 4, 49 Stat. 1379; 15 U.S.C. 78q(a)) or 21(a) (48 Stat 899; 15 U.S.C. 78u(a)) shall, unless made a matter of public record, be deemed confidential. Officers and employees are hereby prohibited from making such confidential information or documents or any other non-public records of the Commission available to anyone other than a member, officer, or employee of the Commission, unless the Commission authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest. Any officer or employee who is served with a subpoena requiring the disclosure of such information or the production of such documents shall appear in court and, unless the authorization described in the preceding sentence shall have been given, shall respectfully decline to disclose the information or produce the documents called for, basing his refusal upon this section. Any officers or employee who is served with such a subpoenalshall promptly advise the Commission of the service of such subpoena, the nature of the information or documents sought, and any circumstances which may bear upon the desirability of making available such information or documents.

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 18 day of July , 1975 deponent served the within Brief upon Diamond + Gobomb Moses Kristov Securities and Exchange Comm.

attonrye(s) for Resp

in this action, at 99 Park ave Engineers Bldg - 26 Federal Plaza Cleveland Ohio N.Y.C. N.Y.C.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

....
ROBERT BAILEY

Sworn to before me, this
18 day of July , 1975.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976